Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 00-65
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance	)	
	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996	)	
To Provide In-Region, InterLATA Services	)	
In Texas	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2000 **Released:** June 30, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. On April 5, 2000, SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively, SWBT) filed its second application for authorization under section 271 of the Communications Act of 1934, as amended,[1] to provide interLATA services in the State of Texas.[2] Although SWBT initially filed for in-region, interLATA authority for the State of Texas

[1] 47 U.S.C. § 271. Section 271 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified* at 47 U.S.C. § 151 *et seq*. We refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act." We refer to the Telecommunications Act of 1996 as "the 1996 Act."

[2] *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 (filed Apr. 5, 2000) (SWBT Texas I Application); *see Comments Requested on Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Texas (CC Docket No. 00-65)*, Public Notice, DA No. 00-750 (rel. Apr. 6, 2000). Unless an affidavit or appendix reference is included, all citations to the "SWBT Application" refer to SWBT's "Brief in Support of Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Texas." References to all affidavits or other sources contained in the appendices submitted by SWBT are initially cited to the Appendix, Volume, and Tab number indicating the location of the source in the record. Subsequent citations to affidavits are cited by the affiant's name, *e.g.*, "SWBT Dysart Aff." Comments on the current application are cited by party name, *e.g.*, "ALTS Comments." Documents, such as (continued....)

on January 10, 2000,[3] that application was withdrawn at SWBT's request.[4] We therefore take no action with respect to SWBT's first application. In this Order, we grant SWBT's second application to enter the in-region, interLATA market in Texas based on evidence that SWBT has taken the statutorily required steps to open its local exchange and exchange access markets to competition.

2. This approval marks, for the first time, an application that is supported by both the Department of Justice and relevant state commission, in this case the Texas Public Utility Commission (Texas Commission). The success of this application is due, in large part, to the extensive review conducted by both the Department of Justice and the Texas Commission.

3. We applaud the efforts of the Texas Commission, which has expended significant time and effort overseeing SWBT's implementation of the requirements of section 271. For more than two years, the Texas Commission has worked with SWBT and competing carriers to identify and resolve a number of key issues related to SWBT's compliance with the Act. As a result of the Texas Commission's efforts, competition has taken root, and is expanding in local telecommunications markets, which ultimately benefits consumers. The Texas Commission utilized a number of effective methods to ensure that the local markets in Texas are open to competition today, and will remain so in the future. Of particular note, the Texas Commission ensured that its section 271 review process was open to participation by all interested parties, and supplemented its review of the operational readiness of SWBT's OSS with an independent third party test. As part of its section 271 review, the Texas Commission also developed clearly defined performance measurements and standards, and adopted a performance remedy plan to discourage backsliding. In a continuing effort to refine and monitor performance measurements, the Texas Commission has a six month review process in place. The Texas Commission is currently considering modifying existing measurements and adding new measurements based on input from SWBT and competing carriers.

(Continued from previous page)
affidavits and declarations, submitted by commenters are cited by the affiant's name and the party submitting the affidavit, *e.g.*, "AT&T Rhinehart Aff.," "Covad Goodpastor Decl." A list of parties that submitted comments or replies is set forth in Appendix A.

[3] *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-4 (filed Jan. 10, 2000) (SWBT Texas II Application); *see Comments Requested on Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Texas (CC Docket No. 00-4)*, Public Notice, DA No. 00-37 (rel. Jan. 10, 2000).

[4] *See* Letter from James D. Ellis, Paul K. Mancini, Martin E. Grambow, Counsel for SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (dated Apr. 5, 2000) (*SBC Apr. 5, 2000 Ex Parte Letter*) at 2; *see also Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Texas*, CC Docket No. 00-4, FCC 00-124, Order (rel. Apr. 6. 2000) (*SWBT Texas I Withdrawal Order*) (granting SWBT's request to withdraw its January 10 Application and to initiate a new application pursuant to section 271 based on the existing record in CC Docket 00-4 and the new information provided by SBC in its April 5 filing).

4. In addition to overseeing SWBT's implementation of the requirements to section 271 approval, the Texas Commission has actively implemented our rules issued under section 251, including the Commission's pricing standards and the rules relating to advanced services. Moreover, to address the concerns raised by the Department of Justice and commenters with respect to SWBT's initial application, the Texas Commission conducted a further review with respect to a number of key section 271 issues. Because of those efforts, this second application by SWBT is an improvement over its first one, especially in those areas identified as deficient by the Department of Justice in its evaluation of SWBT's first application. Furthermore, we accord the Texas Commission's verification of SWBT's compliance substantial weight based on the totality of its efforts and the extent of expertise it has developed on section 271 issues.

5. The fact that SWBT has implemented the competitive checklist in Texas can be seen in the degree of entry into the local exchange market. According to SWBT, it has unbundled more than 302,000 loops (including nearly 244,000 loops as part of an unbundled network element platform or "UNE-P").[5] SWBT also reported resale of approximately 349,000 access lines to competitors (including 191,000 residential lines).[6] The Department of Justice estimates that competitors have captured approximately eight percent of access lines in SWBT's territory in Texas.[7]

6. In addition to competition for voice services, SWBT provisioned nearly 7,000 unbundled loops to broadband competitors for provision of xDSL services.[8] Although this is only a fraction of SWBT's ADSL customer base in Texas,[9] recent implementation of our line sharing requirements will give xDSL providers additional opportunities to compete for residential and small business customers on an equal footing with SWBT's separate affiliate for

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[5] SWBT Texas II Reply, App. A-4, Vol. 1, Tab 3, Reply Affidavit of John S. Habeeb (SWBT Texas II Habeeb Reply Aff.), Attach. A (reporting 58,704 "stand-alone" unbundled loops and 243, 922 UNE loop/port combinations through March 2000).

[6] *Id.* (reporting resale of 157,700 business lines and 191,040 residential lines through March 2000). Parties to this proceeding dispute SWBT's methodology for estimating the number of "facilities-based" lines that are served by competitors (through means other than resale or unbundled loops). Most, however seem to agree that, at a minimum, several hundred thousand access lines are served this way, primarily for business customers in urban areas.

[7] Department of Justice Texas I Evaluation at 9 (estimating 840,000 – 890,000 competitive LEC lines compared with 9.6 million SWBT retail lines).

[8] SWBT Texas II Habeeb Reply Aff. Attach. A (reporting 6,978 unbundled loops to xDSL service providers through March 2000).

[9] Letter from Austin C. Schlick, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Magalie Roman Salas, Esq., Secretary, Federal Communications Commission, CC Docket No. 00-4 at Tab 5 (filed Apr. 21, 2000) (SWBT Apr. 21 *Ex Parte* Letter) (reporting deployment of 36,000 ADSL lines in Texas during the six-month period from October 1999 through March 2000); *see also* SWBT Texas II Brown Reply Aff. (anticipating *monthly* volume of 9,000 ADSL orders for SWBT's advanced services affiliate in Texas by June 2000).

advanced services.[10] Monthly order volumes for unbundled xDSL-capable loops are steadily increasing,[11] as are UNE-P volumes.[12] Additionally, another branded player for voice services—WorldCom—joined AT&T in the Texas market in April with a focus on residential customers.[13]

7. As we noted in the *Bell Atlantic New York Order*, the grant of this application merely closes a chapter. It does not end the story. SWBT must continue to comply with the checklist obligations set forth in section 271, and the separate affiliate requirements of section 272. As noted throughout this Order, should the evidence demonstrate that SWBT ceases to comply with the requirements of the Act, enforcement action may be appropriate.[14] Most notably, section 271(d)(6) authorizes the Commission to suspend or revoke the authorization granted herein.[15]

II. BACKGROUND

A. Statutory Framework

8. In the 1996 Act, Congress conditioned BOC provision of in-region, interLATA service on compliance with certain provisions of section 271.[16] Pursuant to section 271, BOCs must apply to this Commission for authorization to provide interLATA services originating in

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[10] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, paras. 4-5 (rel. Dec. 9, 1999) (*Line Sharing Order*).

[11] SWBT Texas II Habeeb Reply Aff. Attach. A; SWBT Texas II Application, App., Vol. A, Tab 1, Affidavit of John S. Habeeb (SWBT Texas II Habeeb Aff.), Attach. A (reflecting monthly order totals of 1160 loops in January, 1489 loops in February, and 2166 loops in March).

[12] SWBT Texas II Habeeb Reply Aff. Attach. A; SWBT Texas II Habeeb Aff. Attach. A (reflecting monthly order totals of 23,338 lines in January, 32,997 lines in February, and 40,750 lines in March).

[13] WorldCom, Inc. Texas II Reply at 1. WorldCom, Inc. changed its corporate name from MCI WorldCom, Inc. effective May 1, 2000. *Id.* at n.1. AT&T reported capturing 130,000 local phone customers in Texas over UNE-P through March 2000, which represents greater than half of the UNE-P lines served by competitive carriers in Texas. "AT&T Reports Flat Earnings, Lowers Growth Estimates," Communications Daily (May 3, 2000).

[14] *See, e.g., Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413, 5414 (2000) (adopting consent decree after investigation into potential violations of section 271 after grant of in-region, interLATA authority).

[15] 47 U.S.C. § 271(d)(6)(A)(iii).

[16] We note here that, for the provision of international services, a U.S. carrier must separately receive section 214 authorization from the Commission. *See* 47 U.S.C. § 214; *see also Streamlining the International Section 214 Authorization Process and Tariff Requirements, Report and Order*, 11 FCC Rcd 12884 (1996); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 (1997), *recon. pending*. This requirement applies notwithstanding a BOC's approval under section 271 for the provision of in-region, interLATA service originating in a particular state.

any in-region state.[17] Congress has directed the Commission to issue a written determination on each application no later than 90 days after the application is filed.[18]

9. To obtain authorization to provide in-region, interLATA services under section 271, the BOC must show that: (1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);[19] (3) the requested authorization will be carried out in accordance with the requirements of section 272;[20] and (4) the BOC's entry into in-region, interLATA market is "consistent with the public interest, convenience, and necessity."[21] The statute specifies that, unless the Commission finds that these four criteria have been satisfied, the Commission "shall not approve" the requested authorization.[22]

10. Section 271(d)(2)(A) requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate," and the Commission is required to "give substantial weight to the Attorney General's evaluation."[23]

11. In addition, the Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a Statement of Generally Available Terms and Conditions (SGAT), and that either the agreement(s) or general statement satisfy the "competitive checklist."[24] Because the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission's verification.[25]

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[17] *See* 47 U.S.C. § 271.

[18] *Id.* § 271(d)(3).

[19] *Id.* § 271(d)(3)(A). The critical, market-opening provisions of section 251 are incorporated into the competitive checklist found in section 271. *See id.* § 251; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[20] 47 U.S.C. § 271(d)(3)(B).

[21] *Id.* § 271(d)(3)(C).

[22] *Id.* § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413. 416 (D.C. Cir. 1998).

[23] 47 U.S.C. § 271(d)(2)(A).

[24] *Id.* § 271(d)(2)(B).

[25] *Bell Atlantic New York Order* 15 FCC Rcd at 3962, para. 20; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended,* CC Docket No. 97-137, 12 FCC Rcd 20543, 20559- (continued....)

The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.[26] As noted in the Introduction, we accord the Texas Commission's verification of SWBT's compliance substantial weight based on the totality of its efforts and the extent of its expertise on section 271 issues. Like the New York Commission, whose section 271 verification we also accorded substantial weight, the Texas Commission directed a lengthy, rigorous and open collaborative process with active participation by Commission staff and competitive LECs.[27] The Texas Commission also developed a comprehensive performance measurement and remedy plan, which it continues to monitor and refine.[28] In addition, the Texas Commission has taken the lead on a number of emerging technical and legal issues related to provisioning of xDSL-capable loops. We thus place substantial weight on the Texas Commission's comments in this matter, as they reflect its role not only as a driving force behind these proceedings, but also as an active participant in bringing competition for local telecommunications services to Texas.

B. History of this Application

12. In March 1998, SWBT filed with the Texas Commission a draft application to provide in-region, interLATA authority in the State of Texas.[29] On April 7, 1998, after a number of technical conferences and collaborative meetings, the Texas Commission concluded that SWBT had not demonstrated compliance with the requirements of section 271(c).[30] Shortly thereafter, on June 1, 1998, the Texas Commission issued Order Number 25 in which it listed 129 key issues that needed to be resolved before it could recommend approval of SWBT's application.[31]

13. To facilitate the resolution of the issues identified in Order Number 25, the Texas Commission invited SWBT and interested competing carriers to participate in a series of collaborative meetings and workshops and technical conferences, known as the "Texas 271 Collaborative Process."[32] During this process, staff of the Texas Commission, SWBT, and competing carriers worked collaboratively to identify and resolve a number of key issues related

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60 (1997) (*Ameritech Michigan Order*). As the D.C. Circuit has held, "[A]lthough the Commission must consult with the state commissions, the statute does not require the Commission to give State Commissions' views any particular weight." *SBC Communications v. FCC*, 138 F.3d at 416.

[26] *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

[27] *Bell Atlantic New York Order* 15 FCC Rcd at 3962, para. 20.

[28] *Id.*

[29] Texas Commission Texas I Comments at 2.

[30] Texas Commission Texas I Comments at 2.

[31] Texas Commission Texas I Comments at 2.

[32] Texas Commission Texas I Comments at 2.

to SWBT's compliance with section 271, including the operational readiness of SWBT's OSS, and the development of a performance monitoring and enforcement mechanism.[33] Another key component of the Texas Commission's section 271 proceeding was the development and adoption of a model interconnection agreement, which is referred to as the "Texas 271 Agreement" or "T2A."[34] The Texas Commission ensured that its collaborative process was open to participation by all interested parties and, as a result, received and reviewed a massive record of public comments.

14. In connection with its review of the operational readiness of SWBT's OSS, the Texas Commission retained Telcordia (formerly Bellcore) to conduct an independent third party evaluation of SWBT's OSS.[35] The Telcordia test was intended to address a multitude of issues, including the ability of SWBT's OSS to handle commercial volumes of orders, and SWBT's implementation of the performance measurements that had been approved by the Texas Commission during its collaborative process.[36] Following the completion of initial and follow-up testing,[37] Telcordia issued a final report, in which it concluded that SWBT's OSS were "operationally ready to handle commercial volumes of transactions."[38]

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[33] During the collaborative process, the staff of the Texas Commission worked with SWBT and competing carriers to develop a comprehensive set of performance measures and business rules that are intended to capture whether SWBT is providing nondiscriminatory service to competing carriers. The Texas Commission also approved a performance remedy plan that is intended to provide financial incentives for SWBT to maintain an open market and prevent "backsliding." Pursuant to the Plan, SWBT must compensate either competing carriers or the Texas Treasury for noncompliance performance in connection with particular performance measurements. Texas Commission Texas I Comments at 3-4.

[34] Texas Commission Texas I Comments at 3.

[35] Texas Commission Texas I Comments at 5-6.

[36] Texas Commission Texas I Comments at 5.

[37] Telcordia issued two reports on the operational readiness of SWBT's OSS. In its initial report, Telcordia presented the results of its functionality and capacity testing and identified issues that warranted further review. Texas Commission Comments at 30-31. The issues identified by Telcordia in its initial report formed the basis of a re-test plan. *Id.* Following the completion of a retest, Telcordia issued a final report. Telcordia Technologies, *The Public Utility Commission of Texas Southwestern Bell OSS Readiness Report* (Sept. 1999) (Telcordia Final Report), SWBT Ham Texas I Aff., Attach. A. Although in its final report, Telcordia concluded that SWBT's OSS were operationally ready, it highlighted seven areas in which the Texas Commission should focus to remove "service-affecting issues." *Id.* at ES-1, 7. Specifically, Telcordia recommended: (1) the revision of certain procedures for scalability forecasting; (2) the implementation of eleven new performance measures; (3) that the Texas Commission expeditiously resolve thirty issues that were identified during the retest; (4) increased automation of the performance measure reporting process; (5) increased data security and auditability; (6) confirmation of the effectiveness of SWBT's procedures for ordering xDSL-capable loops; and (7) further training for SWBT and competing carriers to improve the understanding and use of SWBT's standard methods and procedures. *Id.* After Telcordia's final report was issued, the Texas Commission worked further with SWBT and competing carriers to resolve the seven issues identified in Telcordia's final report. Texas Commission Texas I Comments at 31-32.

[38] Telcordia Final Report at 7.

15. Upon concluding that all outstanding issues relating to SWBT's compliance with section 271 had been resolved, the Texas Commission voted at its December 16, 1999 open meeting to unanimously support SWBT's section 271 application.[39]

16. As noted above, on January 10, 2000, SWBT filed an application with this Commission to provide in-region, interLATA service in the State of Texas. On April 5, 2000, SWBT filed an extensive supplement to its January 10 Application.[40] Recognizing that such new evidence was filed shortly before the expiration of the 90-day statutory deadline, in its April 5 filing, SWBT requested that the Commission "restart the clock" on its January 10 Application.[41] Alternatively, SWBT asked the Commission to treat its supplemental filing as: (1) a withdrawal of the January 10 Application; and (2) a resubmission of a new application, which incorporates both the January 10 and April 5 filings.[42] On April 6, 2000, the Commission granted SWBT's alternative request to withdraw its January 10 Application and to initiate a new application pursuant to section 271 based on the record generated in response to the January 10 and April 5 filings.[43] Throughout this Order, the January 10 filing will be referred to as the "Texas I Application," and the April 5 filing will be referred to as the "Texas II Application."

C. Texas Commission and Department of Justice Evaluations

17. The Texas Commission submitted its evaluation of SWBT's Texas I and Texas II Applications to this Commission on January 31, 2000[44] and April 26, 2000,[45] respectively. The Texas Commission advises the Commission that SWBT has taken the statutorily required steps to open its local markets to competition.[46] Specifically, the Texas Commission states that SWBT has met its obligation under section 271(c)(1)(A) by entering into interconnection agreements with at least 17 competing carriers that are serving residential and business customers either exclusively or predominantly over their own facilities.[47] In addition, the Texas Commission

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[39] Texas Commission Texas I Comments at 7.

[40] The supplemental filing included a brief and eight affidavits. According to SWBT, this new evidence is intended to respond to issues and arguments that emerged during the course of the January 10 proceeding subsequent to the submission of reply comments on February 22. SWBT Texas II Application at 1.

[41] Letter from James D. Ellis, Paul K. Mancini, Martin E. Grambow, Counsel for SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (dated Apr. 5, 2000) (*SBC Apr. 5, 2000 Ex Parte Letter*) at 2.

[42] *Id.*

[43] *See SWBT Texas I Withdrawal Order.*

[44] The Evaluation of the Public Utility Commission of Texas, CC Docket No. 00-4 (filed Jan. 31, 2000) (Texas Commission Texas I Comments).

[45] The Evaluation of the Public Utility Commission of Texas, CC Docket No. 00-65 (filed Apr. 26, 2000) (Texas Commission Texas II Comments).

[46] Texas Commission Texas I Comments at 1.

[47] Texas Commission Texas I Comments at 95.

states that the record developed in the Texas proceeding establishes that SWBT has a legal obligation, under its interconnection agreements and state-approved tariffs, to provide the 14 items required under section 271's checklist, and that SWBT is meeting its legal obligation to provide these 14 items.[48]

18. In its evaluation of SWBT's Texas II Application, the Texas Commission acknowledges the Department of Justice's finding that SWBT's initial application was deficient in certain critical areas.[49] To address these concerns, the Texas Commission states that it conducted a further review. Specifically, the Texas Commission states that it reexamined the evidence with respect to: (1) the integration of SWBT's pre-ordering and ordering interfaces; (2) the coordination, timing and quality of SWBT "hot cut" process; and (3) SWBT's provisioning of loops used by competing carriers to provide advanced services.[50] Based on the evidence presented in SWBT's Texas I Application, and its further review, the Texas Commission concludes that SWBT has taken the statutorily required steps to open its local markets to competition.[51]

19. The Department of Justice filed its evaluation of SWBT's Texas I Application on February 14, 2000.[52] In this evaluation, the Department of Justice recommended that SWBT's application be denied.[53] The Department of Justice submitted evaluations of SWBT's Texas II Application on May 12[54] and June 13, 2000.[55] In its May 12 evaluation, the Department of

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[48] Texas Commission Texas I Comments at 10-90.

[49] Texas Commission Texas II Comments at 11, 34, 36; *see also infra* note 55 and accompanying text.

[50] Texas Commission Texas II Comments at 1.

[51] *Id.*

[52] Evaluation of the United States Department of Justice, CC Docket No. 00-4 (filed Feb. 14, 2000) (Department of Justice Texas I Evaluation).

[53] In its evaluation, the Department of Justice concluded that, although SWBT had shown substantial progress in opening its local markets to competition, it failed to satisfy the requirements of section 271 in the critical area of providing unbundled loops. Department of Justice Texas I Evaluation at 2. Specifically, the Department of Justice found that SWBT's performance was deficient with respect to providing unbundled loops for advanced services and coordinated conversions, or "hot cuts." *Id.* at 2-3. In addition to its findings with respect to xDSL and hot cuts, the Department of Justice expressed concern about some of the evidence presented by SWBT to demonstrate compliance with other section 271 requirements. For example, the Department of Justice noted that there was insufficient evidence in the record to determine whether SWBT could provide interconnection trunks in a timely manner, and whether carriers could compete effectively using the UNE-platform. *Id.* at 44-49 (interconnection), 49-53 (UNE-platform). The Department of Justice recommended that the Commission defer judgment on these issues until additional commercial data is available. *Id.* at 52-53. Moreover, the Department of Justice stated that the OSS test performed by Telcordia had significant limitations. In particular, the Department of Justice noted that, due to its limited scope and depth, "the Telcordia test does not provide evidence that SBC provides adequate wholesale services overall to CLECs in Texas." *Id.* at 5.

[54] Evaluation of the United States Department of Justice, CC Docket No. 00-65 (filed May, 12, 2000) (Department of Justice Texas II May 12 Evaluation).

Justice concluded that SWBT's performance with respect to interconnection trunking had sufficiently improved to alleviate its concerns with respect to this issue.[56] It stated, however, that it would provide the Commission with its analysis of SWBT's performance in providing DSL-capable loops, hot cuts for analog loops, and UNE-platform after it had reviewed SWBT's April performance data. In its June 13, 2000 evaluation, the Department of Justice recommends approval of SWBT's application to provide long distance service in Texas, subject to certain qualifications.[57]

20. In recommending approval of SWBT's Texas II Application, the Department of Justice notes that SWBT has addressed many of the deficiencies associated with its first application. More specifically, the Department of Justice concludes that SWBT has significantly improved the process by which it measures and reports its performance in providing unbundled loops for DSL services, and has demonstrated improvement in its ability to provision DSL-capable loops in a nondiscriminatory manner.[58] Indeed, the Department of Justice concludes that recent data indicate that SWBT "is now providing parity under virtually all measures relating to the provisioning of DSL loops."[59] The Department of Justice further finds that SWBT has demonstrated improvement in cutting over a loop to a competing carrier through both the coordinated hot cut (CHC) and frame due time (FDT) processes.[60] Finally, the Department of Justice states that commercial data with respect to competing carriers' ability to compete via the UNE-platform are encouraging. Indeed, the Department of Justice notes that entry by competing carriers using the UNE-platform has increased steadily over the last few months.

III. ANALYTICAL FRAMEWORK

A. Overview

21. As part of our determination that SWBT has satisfied the requirements of section 271, we consider whether SWBT has fully implemented the competitive checklist in subsection (c)(2)(B).[61] In demonstrating compliance with each item on the competitive checklist, a BOC

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[55] Letter from Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, Department of Justice, to Magalie Roman Salas, Secretary, FCC (dated June 13, 2000) (Department of Justice Texas II Evaluation).

[56] *Id.* at 5.

[57] *Id.* at 1. For example, the Department of Justice recommends that the Commission ensure that adequate mechanisms exist to resolve emerging issues that will affect competition, such as DSL line sharing and SBC's Project Pronto. *Id.* at 20. As the Department of Justice notes, "Project Pronto is an SBC network upgrade that will employ fiber optic cable and remote terminals to provide DSL services to customers that are out of reach to central office digital subscriber line access multiplexers ('DSLAMS')." *Id.* at 7.

[58] *Id.* at 2-8.

[59] *Id.* at 4.

[60] *Id.* at 8-9.

[61] *See* 47 U.S.C. § 271(d)(3). As set forth below, we conclude that SWBT has satisfied the requirements of subsection (c)(1)(A) ("Track A") and thus merits analysis under section 271(d)(3)(A)(i) of our rules.

must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.[62]

22. Section 271 conditions authorization to enter the long-distance market on a BOC's compliance with the terms of the competitive checklist, and those terms generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs. In a variety of proceedings since 1996, this Commission has discharged its statutory authority to issue comprehensive rules and orders giving specific content to those obligations, often in considerable detail. In determining whether a BOC applicant has met the local competition prerequisites for entry into the long-distance market, therefore, we evaluate its compliance with our rules and orders in effect at the time the application was filed.

23. Despite the comprehensiveness of our local competition rules, there will inevitably be, at any given point in time, a variety of new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act. Several commenters seek to use this section 271 proceeding as a forum for the mandatory resolution of many such local competition disputes, including disputes on issues of general application that are more appropriately the subjects of industry-wide notice-and-comment rulemaking. Indeed, those commenters would apparently compel this Commission to resolve those disputes in this proceeding, and to resolve each one in favor of SWBT, as a precondition to determining that SWBT has met the statutory obligations of section 271.

24. The position of those commenters is irreconcilable with this statutory scheme. There may be other kinds of statutory proceedings, such as certain complaint proceedings, in which we may bear an obligation to resolve particular interpretive disputes raised by a carrier as the basis for its complaint.[63] But the section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.

25. First, Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications -- generally dominated by extremely fact-intensive disputes about an individual BOC's empirical performance -- are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. If Congress had intended to compel us to use section 271 proceedings for that purpose, it would not have confined our already intensive review to an extraordinarily compressed 90-day timetable.

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[62] *Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, para. 52 (*Ameritech Michigan Order*).

[63] *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

26. Second, Congress designed section 271 to give the BOCs an important incentive to open their local markets to competition, and that incentive presupposes a realistic hope of attaining section 271 authorization. That hope would largely vanish if a BOC's opponents could effectively doom any section 271 application by freighting their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor. Indeed, if that were the required approach, the BOCs would face enormous uncertainty about the steps they need to take to win section 271 authorization, and they would therefore lose much of their incentive to cooperate in opening their local markets to competition in the first place. That result would disserve the public interest in greater competition in both local and long-distance markets, and it would defeat the congressional intent underlying this statutory scheme.

27. Finally, simply as a matter of statutory construction, few of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules. That is most obviously true in the case of our legislative rules under section 251(d)(2) identifying "what network elements should be made available,"[64] but it is also true of our many other rules and orders giving content to the broadly-worded provisions of the 1996 Act. Our rules vary with time, redefining the statutory obligations that govern the market. Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application. Nothing in section 271 or any other provision of the Act compels us to require a BOC applicant to demonstrate compliance with new local competition obligations that were unrecognized at the time the application was filed.

B. Compliance With Unbundling Rules

28. One element of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules governing unbundled network elements. It is necessary to clarify the aspects of the new rules governing incumbent LECs' unbundling and line sharing obligations with which we expect SWBT to demonstrate compliance in this proceeding. We note that both the *UNE Remand Order* and the *Line Sharing Order* introduced new rules which did not become binding until after SWBT filed its second section 271 application for Texas, on April 5, 2000.[65] We conclude that, for the purpose of evaluating compliance with checklist item 2, we require SWBT to demonstrate that it is currently in compliance with the

[64] 47 U.S.C. § 251(d)(2).

[65] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd at 3696 (1999) (*UNE Remand Order*); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Fourth Report and Order, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

rules in effect on the date of filing, but do not require SWBT to demonstrate that it complies with rules that become effective during the pendency of its application.

29. We emphasize that, on an ongoing basis, SWBT must comply with all of the Commission's rules implementing the requirements of sections 251 and 252 upon the dates specified by those rules. This includes such rules that have taken effect since the date SWBT filed its application, such as the new unbundling rules that became effective on May 18, 2000.

30. In the *Local Competition First Report and Order*, the Commission established a list of seven unbundled network elements (UNEs) which incumbent LECs were obliged to provide.[66] This obligation was codified in section 51.319 of the Commission's rules (rule 319).[67] In January 1999, the Supreme Court vacated rule 319 and instructed the Commission to revise the standards under which the unbundling obligation is determined and to reevaluate the network elements subject to the unbundling requirement.[68] On November 5, 1999, we released the *UNE Remand Order*, in which we reevaluated the unbundling obligations of incumbent LECs and promulgated a new rule 319, pursuant to the Supreme Court's direction and sections 251(c)(3) and 251(d)(2) of the Act. With certain exceptions, the new rule 319 and other requirements set forth in the *UNE Remand Order* took effect on February 17, 2000, 30 days after publication in the Federal Register.[69] The remaining aspects of the new rule 319 did not take effect until 120 days after the publication date, or May 18, 2000.[70] Therefore, on April 5, 2000, when SWBT

[66] The seven network elements set forth in the *Local Competition Order* were: (1) local loops; (2) network interface devices; (3) local and tandem switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC, 120 F.3d 753* (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *on remand*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999).

[67] 47 C.F.R. § 51.319.

[68] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching this conclusion, the Court held that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2) in establishing the list of seven network elements. *Id.* at 387-92.

[69] *UNE Remand Order* at para. 526. The order was published in the Federal Register on January 18, 2000. *See Revision of the Commission's Rules Specifying the Portions of the Nation's Local Telephone Networks That Incumbent Local Telephone Companies Must Make Available to Competitors*, 65 Fed. Reg. 2542 (2000).

[70] *See UNE Remand Order* at para 526. The requirements that were not contained in § 51.319 prior to the rule being vacated by the Supreme Court in *Iowa Utils. Bd.* became effective 120 days after publication in the Federal Register. These are: the requirement to provide access on an unbundled basis to dark fiber as set forth in § 51.319(a)(1); the requirement to provide access on an unbundled basis to subloops and inside wire as set forth in § 51.319(a)(2); the requirement to provide access on an unbundled basis to packet switching in the limited circumstances set forth in § 51.319(c)(3)(B); the requirement to provide access on an unbundled basis to dark fiber transport as set forth in § 51.319(d)(1)(B); the requirement to provide access on an unbundled basis to the Calling Name Database, 911 Database, and E911 Database as set forth in §51.319(e)(2)(A); and the requirement to provide access on an unbundled basis to loop qualification information as set forth in § 51.319(g). *Id.* n.1040. We note that the T2A already contains provisions addressing many of these items. SWBT Texas 1 Auinbauh Aff. at para. 86.

filed its re-application for section 271 authorization in Texas, certain aspects of the new rule 319 were not yet in effect.

31. In order to demonstrate compliance with checklist item 2, SWBT must demonstrate that it complies fully with those portions of the new rule 319 that took effect in February 2000, and thus were binding on the date SWBT filed this second application. Indeed, in the Texas I proceeding, SWBT had already committed to demonstrate compliance with the requirements of the *UNE Remand Order* that took effect in February 2000.[71] No commenter has objected to SWBT's position.

32. For the purpose of evaluating whether its application satisfies section 271, we do not require SWBT to demonstrate that it complies with those portions of the new rule 319 that took effect in May 2000. Although SWBT, like all other incumbent LECs, was required to comply with rule 319 in May 2000, we believe it would be unfair to require SWBT to demonstrate compliance with rules that become effective after it submits an application for section 271 authorization, in advance of the effective date for other incumbent LECs. In addition, were we to require SWBT to supplement the record with additional evidence demonstrating its compliance with the new *UNE Remand* rules once they became effective on May 18, 2000, such a re-opening of the record would be administratively complicated and inconsistent with our well-established procedural framework for section 271 applications.[72] A similar procedural situation was presented in the *Bell Atlantic New York* proceeding. Bell Atlantic filed its application for section 271 authorization in New York after the *UNE Remand Order* had been adopted but before it had taken effect and, thus, at a time when no binding section 319 rule was in effect.[73] Bell Atlantic suggested, and we agreed, that it would be reasonable for the Commission to use the original seven network elements identified in former rule 319 in evaluating compliance with checklist item 2 of its application.[74] We declined to require Bell Atlantic to demonstrate compliance with the new rule 319 because we recognized that the new rule would not take effect until after the release of the *Bell Atlantic New York Order*, and because we believed it would be unfair to require Bell Atlantic to demonstrate compliance with new rules weeks or months before the rule became binding on other incumbent LECs. We thus find SWBT's approach to rule 319 to be reasonable, and consistent with our analysis in the *Bell Atlantic New York Order*.

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[71] SWBT Texas I Application at 36-37; SWBT Texas I Auinbauh Aff. at paras. 85-86. SWBT offers access through the T2A to the UNEs defined in the original rule 319. In addition, SWBT has complied with the *UNE Remand Order's* revised rule 319 by developing revised definitions of the loop, network interface device (NID), and interoffice transport network elements, and making these new definitions available to competitive LECs through an amendment to the T2A. *Id.*

[72] *See* section III.C.1, *infra.*

[73] Bell Atlantic filed an application for section 271 authority in New York on September 29, 1999. *Bell Atlantic New York Order*, 15 FCC Rcd at 3953, para. 1.

[74] *Bell Atlantic New York Order*, 15 FCC Rcd at 3966-67, paras. 30-31.

33. For similar reasons, as discussed below, we do not require SWBT to prove that it has implemented the OSS and other loop facility modifications necessary to accommodate requests for line sharing as required in the Line Sharing Order.[75]

C. Scope of Evidence in the Record

1. Procedural Framework

34. Section 271 proceedings are, at their core, adjudications that the Act requires the Commission to complete within ninety days of the application filing. The statute also requires us to consult with the Department of Justice and the relevant state commission in reviewing the application. In the context of this statutory framework, the Commission has established procedural rules governing BOC section 271 applications.[76] Among other things, these rules provide an opportunity for parties other than the Department of Justice and the relevant state commission to comment on section 271 applications.

35. Under our procedural rules governing BOC section 271 applications, we expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings.[77] An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application.[78] This includes the submission, on reply, of factual evidence gathered after the initial filing. In an effort to meet its burden of proof, however, a BOC may submit new factual information after the application is filed, if the sole purpose of that evidence is to rebut arguments or facts submitted by other commenters.[79] The new evidence, however, must cover only the period placed in dispute by commenters and may, in no event, post-date the filing of the

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[75] *See* section V.D, *infra*. The *Line Sharing Order* amends the Commission's rules to require incumbent LECs to provide, as a network element, access to the high-frequency portion of the local loop to a requesting competitive LEC on loops that carry the incumbent LEC's basic telephone service. *See Line Sharing Order*, 14 FCC Rcd at 20926, para. 25.

[76] *See, e.g., Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (Dec. 6, 1996) (Dec. 6, 1996 Public Notice); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (Jan. 17, 1997) (Jan. 17, 1997 Public Notice); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997) (Sept. 19, 1997 Public Notice); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (Sept. 28, 1999) (Sept. 28, 1999 Public Notice).

[77] Sept. 19, 1997 Public Notice at Section B.

[78] *Id.*; *Bell Atlantic New York Order*, 15 FCC Rcd at 3968, para. 34; *Ameritech Michigan Order*, 12 FCC Rcd at 20570-71, para. 50.

[79] *Id.*

comments (*i.e.*, day 20).[80] In the event that the applicant submits new or post-dated evidence in replies or *ex parte* filings and the evidence is not directly responsive to commenting parties, we retain the discretion to start the 90-day review process anew or to accord such evidence no weight.[81]

36. This precedent has served the Commission well by deterring incomplete filings from the BOCs. In particular, the rule is designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments.[82] The rule has enabled us properly to manage our own internal consideration of the application and ensures that commenters are not faced with a "moving target" in the BOC's section 271 application. We continue to believe, as a general matter, that it is highly disruptive to our processes to have a record that is constantly evolving. We emphasize, however, that our precedent makes clear that this rule is a discretionary one.[83]

37. We do not expect that a BOC, in its initial application, will anticipate and address every foreseeable argument its opponents might make in their subsequent reply comments, but we have previously stated that a BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. Through state proceedings, BOCs should be able reasonably to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.[84]

38. In addition, the Commission has found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271.[85] In order to gain in-

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[80] Sept. 19, 1997 Public Notice at Section B; *Ameritech Michigan Order*, 12 FCC Rcd at 20570-71, para. 50.

[81] *Id.* (citing Jan. 17, 1997 Public Notice). The Commission subsequently released a procedural public notice incorporating this policy for future section 271 applications, *see* Sept. 19 Public Notice at Section B.

[82] *Ameritech Michigan Order*, 12 FCC Rcd at 20573, para. 54.

[83] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20571, para. 51 ("[I]f a BOC chooses to submit such evidence . . . we reserve the discretion . . . to accord the new evidence no weight in making our determination."); *id.* at para. 54 ("[W]e find that using our discretion to accord BOC submissions of new factual evidence no weight will ensure that our proceedings are conducted in 'such manner as will best conduce to the proper dispatch of business and to the ends of justice.'"); *id.* at para. 57 ("By retaining the discretion to accord new evidence no weight . . . . "); *id.* at para. 59 ("Because we will exercise our discretion in determining whether to accord new factual evidence any weight, we deny [the motion to strike]"); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20674 ("Given the complexity of this data and the fact that interested parties have not had an opportunity to address it, we exercise our discretion to accord the information minimal weight."); Dec. 10 Public Notice at 1 ("[I]f parties choose to submit new evidence, [the Commission] retains the discretion to accord new evidence no weight.").

[84] *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20575.

[85] *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 37; *Ameritech Michigan Order*, 12 FCC Rcd at 20573-74.

region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Thus, we must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirements of section 271. Changes or upgrades (*e.g.*, development of new processes for providing access to checklist items) that post-date the application will not be relied upon for checklist compliance, but may provide us with further assurances that the applicant will continue to satisfy the conditions of market entry in the future.

39. With this procedural framework in mind, we find it appropriate to consider in connection with this application SWBT's Texas performance data for the month of April 2000, even though the month contains a few days that extend beyond the comment filing date, April 26, 2000. We believe that it would be administratively burdensome and would not result in any material change to the submitted data if we were to formalistically require SWBT to omit the last four days of April from its reports for the purposes of this proceeding. SWBT's state-approved procedures are geared toward generating performance reports on a monthly basis, and competitive LECs have become accustomed to receiving them in the same form.

40. Moreover, generation of a special report, *e.g.*, covering only the dates from April 1 to April 26, 2000, would pose a greater risk of manipulation or miscalculation and would presumably make it more difficult for competitive LECs to compare the reported data with their own records, which they have become accustomed to receiving in monthly reports. We find the monthly performance reports created in the ordinary course of business and according to established procedures to be inherently more reliable than any abbreviated report. In addition, submission of a second set of April performance data (consisting of hundreds of pages of nearly duplicative material) would make an already voluminous and complex docket even more difficult for interested parties to follow. Additionally, a partial month of data arguably would be less valuable for examining trends from previous full months. For these reasons we do not believe that any party to this proceeding is prejudiced by our decision to include consideration of the last four days of SWBT's April performance reports.

2. *Ex Parte* Submissions

41. Under the procedural rules governing section 271 applications, we strongly encourage parties to set forth their views comprehensively in their formal submissions (i.e., Brief in Support, oppositions, supporting comments, etc.), and not to rely on subsequent *ex parte* presentations. At the same time, the Commission expressly provided that parties may file *ex partes*. Our procedural Public Notice thus clearly contemplates that parties may file written *ex partes*, when appropriate, to clarify the record.[86] We take this opportunity to clarify that like reply comments, *ex partes* must be directly responsive to arguments raised by parties commenting on the application. Such *ex partes* may, however, elaborate on, or provide additional explanation or detail in response to requests from Commission staff or in direct response to post-reply *ex parte* filings.

[86] Sept. 19 Public Notice at Section H (establishing page limitations for *ex partes*, subject to certain exceptions).

42. Nothing in our procedural rules or past precedent precludes the Commission and the staff from requesting clarification or an explanation about information or data contained in the filings specified above. Indeed, our procedural Public Notice expressly recognizes that the Commission may request additional information from the applicant, as the page limit for *ex partes* does not apply to written material filed in response to direct requests from Commission staff.[87] It is critical to the agency's deliberative process that the Commission and staff fully understand the evidence and arguments presented in the BOC's section 271 application, arguments raised in opposition, and responses made by parties on reply. Accordingly, the Commission retains the discretion to request additional information from the applicant or other parties that elaborates on positions set forth in the original application, comments, or reply comments.[88] We emphasize that we are not departing from our view that the applicant should set forth its position in a clear and concise manner in its formal filings. However, it is imperative that, as part of the Commission's deliberative process, we have the ability to engage in an ongoing dialogue with parties to ensure that we have a clear and accurate understanding of the information contained in all formal submissions.

D. Framework for Analyzing Compliance with Statutory Requirements

43. In this section, we discuss two aspects of the framework for analyzing compliance with the statutory requirements of section 271. First, we discuss the legal standards we have enunciated in past orders for determining whether a BOC is meeting the statutory nondiscrimination requirements. Second, we discuss the evidentiary requirements of a BOC's section 271 application and, in particular, the types of showings we will find probative in deciding whether a BOC has met the statutory standards.

1. Legal Standard

44. In order to comply with the requirements of section 271's competitive checklist, a BOC must demonstrate that it has "fully implemented the competitive checklist in subsection (c)(2)(B)."[89] In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.[90] Previous Commission orders addressing section 271 applications have elaborated on this statutory standard. First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*,

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[87] *Id.*

[88] Consistent with section 1.1204(a)(b) of our rules, responses to Commission inquiries will generally be placed in the record. 47 C.F.R § 1.204(a)(b).

[89] *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20599.

[90] 47 U.S.C. § 271(c)(1)(B)(i), (ii).

substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.[91] For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[92]

45. We do not view the "meaningful opportunity to compete" standard to be a weaker test than the "substantially the same time and manner" standard. Where the BOC provides functions to its competitors that it also provides for itself in connection with its retail service, its actual performance can be measured to determine whether it is providing access to its competitors in "substantially the same time and manner" as it does to itself. Where the BOC, however, does not provide a retail service that is similar to its wholesale service, its actual performance with respect to competitors cannot be measured against how it performs for itself because the BOC does not perform analogous activities for itself. In those situations, our examination of whether the quality of access provided to competitors offers "a meaningful opportunity to compete" is intended to be a proxy for whether access is being provided in substantially the same time and manner and, thus, is nondiscriminatory.

46. Finally, we note that a determination of whether the statutory standard is met is ultimately a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally. We have not established, nor do we believe it appropriate to establish, specific objective criteria for what constitutes "substantially the same time and manner" or a "meaningful opportunity to compete." We look at each application on a case-by-case basis and consider the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met. Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances.

2. Evidentiary Case

47. We have set forth above the analytical framework that we use in assessing whether a BOC has demonstrated compliance with the statutory requirements of section 271. At the outset, we reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement.[93]

48. The evidentiary standards governing our review of section 271 applications are intended to balance our need for reliable evidence against our recognition that, in such a complex

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[91] *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

[92] *Id.*

[93] *Bell Atlantic New York*, 15 FCC Rcd at 3972, para. 47; *Application of BellSouth Corporation for Provision of In-Region, Inter-LATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599 at 20635-36, para. 57 (*Second BellSouth Louisiana Order*); *Ameritech Michigan Order*, 12 FCC Rcd at 20567-68, para. 43.

endeavor as a section 271 proceeding, no finder of fact can expect proof to an absolute certainty. While we expect the BOC to demonstrate as thoroughly as possible that it satisfies each checklist item, the public interest standard, and the other statutory requirements, we reiterate that the BOC needs only to prove each element by "a preponderance of the evidence," which generally means "the greater weight of evidence, evidence which is more convincing that the evidence which is offered in opposition to it."[94]

49. As we held in the *Second BellSouth Louisiana Order*, we first determine whether the BOC has made a *prima facie* case that it meets the requirements of a particular checklist item. The BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met. Once the BOC has made such a showing, opponents must produce evidence and arguments to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor.[95]

50. When considering commenters' filings in opposition to the BOC's application, we look for evidence that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements of the checklist item. Mere unsupported evidence in opposition will not suffice.[96] Although anecdotal evidence may be indicative of systemic failures, isolated incidents may not be sufficient for a commenter to overcome the BOC's *prima facie* case. Moreover, a BOC may overcome such anecdotal evidence by, for example, providing objective performance data that demonstrate that it satisfies the statutory nondiscrimination requirement.

51. We will look to the state to resolve factual disputes wherever possible. Indeed, we view the state's and the Department of Justice's roles to be similar to that of an "expert witness." Given the 90-day statutory deadline to reach a decision on a section 271 application, the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor. Accordingly, as discussed above, where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision.

52. To make a *prima facie* case that the BOC is meeting the requirements of a particular checklist item under section 271(c)(1)(A), the BOC must demonstrate that it is providing access or interconnection pursuant to the terms of that checklist item. In particular, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and

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[94] *Bell Atlantic New York Order*, 15 FCC Rcd at 3972-73, para. 48; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39, para. 59; *Ameritech Michigan Order*, 12 FCC Rcd at 20568-69, para. 45.

[95] *Bell Atlantic New York Order*, 15 FCC Rcd at 3973, para. 49; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39, para. 59.

[96] *See Ameritech Michigan Order*, 12 FCC Rcd at 20569, para. 45 (concluding that greater weight will be attached to comments and pleadings supported by an affidavit or sworn statement than to an unsupported contrary pleading); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 47.

other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.[97]

53. The particular showing required to demonstrate compliance will vary depending on the individual checklist item and the circumstances of the application. We have given BOCs substantial leeway with respect to the evidence they present to satisfy the checklist. Although our orders have provided guidance on which types of evidence we find more persuasive, "we reiterate that we remain open to approving an application based on other types of evidence if a BOC can persuade us that such evidence demonstrates nondiscriminatory treatment and other aspects of the statutory requirements."[98] In past orders we have encouraged BOCs to provide performance data in their section 271 applications to demonstrate that they are providing nondiscriminatory access to unbundled network elements to requesting carriers.[99] We have concluded that the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage.[100] Performance measurements are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.

54. A number of state commissions, including Texas, have established a collaborative process through which they have developed, in conjunction with the incumbent and competing carriers, a set of measures, or metrics, for reporting of performance in various areas.[101] Through such collaborative processes, Texas has also adopted performance standards for certain functions, typically where there can be no comparable measure based on the incumbent LEC's retail

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[97] *Bell Atlantic New York Order*, 15 FCC Rcd at 3973, para. 52; *Ameritech Michigan Order*, 12 FCC Rcd at 20601-02, para. 110.

[98] *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39, para. 59.

[99] *See, e.g., Bell Atlantic New York Order* at 3974, para. 53; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20658-59, para. 92; *Ameritech Michigan Order*, 12 FCC Rcd at 20627-52; *Application by BellSouth Corp. et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, *BellSouth Louisiana Order*, 13 FCC Rcd 6245, 6258-81, paras. 21-58 (1998) (*First BellSouth Louisiana Order*); *Application by BellSouth et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order,13 FCC Rcd 539, 597-634 (*BellSouth South Carolina Order*).

[100] *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655, para. 86; *Ameritech Michigan Order*, 12 FCC Rcd at 20618, para. 138;

[101] In our *Performance Measurements NPRM* we proposed a model set of reporting requirements that states could adopt to measure whether an incumbent LEC is providing interconnection, resale, and unbundled network elements on nondiscriminatory terms. *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (rel. Apr. 17, 1998) (*Performance Measurements NPRM*). This Commission has not, however, adopted, as a federal requirement, a particular set of metrics or performance standards.

performance. We strongly encourage this type of process, because it allows the technical details that determine how the metrics are defined and measured to be worked out with the participation of all concerned parties. We also strongly support the efforts of state commissions to build and oversee a process that ensures the development of local competition that Congress intended. An extensive and rigorous evaluation of the BOC's performance by the states provides greater certainty that barriers to competition have been eliminated and the local markets in a state are open to competition.

55. We caution, however, that adoption by a state of a particular performance standard pursuant to its state regulatory authority is not determinative of what is necessary to establish checklist compliance under section 271. We recognize that metric definitions and incumbent LEC operating systems will likely vary among states, and that individual states may set standards at a particular level that would not apply in other states and that may constitute more or less than the checklist requires. Therefore, in evaluating checklist compliance in each application, we consider the BOC's performance within the context of each respective state. For example, where a state develops a performance benchmark with input from affected competitors and the BOC, such a standard may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete.[102]

56. We emphasize that, because the Commission is statutorily required to determine checklist compliance, we must independently evaluate whether a BOC is fulfilling the nondiscrimination requirements of section 271. Nevertheless, in making our evaluation we will examine whether the state commission has adopted a retail analogue or a benchmark to measure BOC performance and then review the particular level of performance the state has required. If the state commission has made these determinations in the type of rigorous collaborative proceeding described above, we are much more likely to find that they are reasonable and appropriate measures of parity. Accordingly, we are inclined to rely on such standards and measurements in our own analysis but may reach a different conclusion where justified.

57. In determining that SWBT has satisfied each element of the competitive checklist, we rely, among other factors, on performance data collected and submitted by SWBT. Several commenters challenge the validity of certain data submitted by SWBT, however, including performance data collected and reported pursuant to the performance measurements developed under the auspices of the Texas Commission.[103] We reject the contention that SWBT's data are generally invalid because they have not been audited, and thus cannot be relied upon to support its application. We note that the data submitted by SWBT in this proceeding have been subject to scrutiny and review by interested parties. To a large extent, moreover, the accuracy of the

[102] We also recognize that states may choose to set their performance benchmarks at levels higher than what is necessary to meet the statutory nondiscrimination standard. *Bell Atlantic New York Order* at para. 55, n.107.

[103] *See* AT&T Texas II Reply Comments at 36 (arguing that SWBT should be required to prove the accuracy and reliability of its data collection and reporting processes); AT&T Texas I Pfau/DeYoung Decl. at paras. 15, 25, 56-58; WorldCom Texas I Comments at 34 (arguing that SWBT's data have not been sufficiently audited and thus are unreliable).

specific performance data relied upon by SWBT is not contested. Where particular SWBT data are disputed by commenters, we discuss these challenges in our checklist analysis, below. In such instances, we first look to the results of data reconciliations between SWBT and competing carriers. In other instances, we examine data collected and submitted by commenters in addition to SWBT's data.

58. The determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before us. There may be multiple performance measures associated with a particular checklist item, and an apparent disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. Other measures may tell a different story, and provide us with a more complete picture of the quality of service being provided. Whether we are applying the "substantially same time and manner" standard or the "meaningful opportunity to compete" standard, we will examine whether any differences in the measured performance are large enough to be deemed discriminatory under the statute. For this reason, and because standards established by the Texas Commission are not necessarily determinative of checklist compliance, we note that SWBT's failure of individual performance measurements does not, in itself, warrant denial of this application.[104]

IV. COMPLIANCE WITH SECTION 271(C)(1)(A)

A. Background

59. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[105] To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[106] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."[107] The Commission concluded in the *Ameritech Michigan Order* that, when a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each carrier need not provide service to both residential and business customers.[108]

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[104] We thus reject AT&T's contention that the application should be denied on the ground that SWBT failed to satisfy the Texas Commission's parity or benchmark standards for certain Texas performance measurements. *See* AT&T Texas II Comments at 64.

[105] 47 U.S.C. § 271(d)(3)(A).

[106] *Id.*

[107] *Id.*

[108] *Ameritech Michigan Order,* 12 FCC Rcd at 20589, para. 85. *See also BellSouth Louisiana Order*, 13 FCC Rcd 20633-35 at paras. 46-48.

B. Discussion

60. We conclude that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Texas. Specifically, we find that AT&T, Birch, CoServ, ETS, Optel, Sage, and KMC all provide telephone exchange service either exclusively or predominantly over their own facilities to residential subscribers and to business subscribers.[109] The Texas Commission also concludes that SWBT has met the requirements of section 271(c)(1)(A).[110] None of the commenting parties, including the competitors cited by SWBT in support of its showing, challenge SWBT's assertion in this regard.

V. CHECKLIST COMPLIANCE

A. Checklist Item 1 – Interconnection

1. Non-Pricing Aspects of Interconnection

a. Background

61. Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[111] Section 251(c)(2) imposes a duty on incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[112] In the *Local Competition First Report and Order*, the Commission concluded that interconnection referred "only to the physical linking of two networks for the mutual exchange of traffic."[113] Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection "at any technically feasible point within the carrier's network."[114] Second, an incumbent LEC must provide

[109] Texas Commission Texas I Comments at 96.

[110] Texas Commission Texas I Comments at 95-96. Although the Department of Justice does not address business and residential subscribers separately, it states that competitive LECs have a total of approximately 840,000 – 890,000 access lines, representing approximately eight percent of SWBT's Texas market. Department of Justice Texas I Evaluation at 9.

[111] 47 U.S.C. § 271(c)(2)(B)(i); *see Bell Atlantic New York Order*, 15 FCC Rcd at 3977-78, para. 63; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640, para. 61; *Ameritech Michigan Order*, 12 FCC Rcd at 20662-63, para. 222.

[112] 47 U.S.C. § 251(c)(2)(A).

[113] *Local Competition First Report and Order*, 11 FCC Rcd at 15590, para. 176. Transport and termination of traffic are therefore excluded from the Commission's definition of interconnection. *See Id.*

[114] 47 U.S.C. § 251(c)(2)(B). In the *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order*, 11 FCC Rcd at 15607-09, paras. 204-211.

interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[115] Finally, the incumbent LEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[116]

62. To implement the equal-in-quality requirement in section 251, the Commission's rules require an incumbent LEC to design and operate its interconnection facilities to meet "the same technical criteria and service standards" that are used for the interoffice trunks within the incumbent LEC's network.[117] In the *Local Competition First Report and Order*, the Commission identified trunk group blockage and transmission standards as indicators of an incumbent LEC's technical criteria and service standards.[118] In prior section 271 applications, the Commission concluded that disparities in trunk group blockage indicated a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations.[119]

63. In the *Local Competition First Report and Order*, the Commission concluded that the requirement to provide interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory" means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations.[120] The Commission's rules interpret this obligation to include, among other things, the incumbent LEC's installation time for interconnection service[121] and its provisioning of two-way trunking arrangements.[122] Similarly, repair time for troubles affecting interconnection trunks is useful for determining whether a BOC provides

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[115] 47 U.S.C. § 251(c)(2)(C).

[116] 47 U.S.C. § 251(c)(2)(D).

[117] *Local Competition First Report and Order*, 11 FCC Rcd at 15613-15, paras. 221-225; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20641-42, paras. 63-64.

[118] *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, paras. 224-25.

[119] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20648-50, paras. 74-77; *Ameritech Michigan Order*, 12 FCC Rcd at 20671-74, paras. 240-45. The Commission has relied on trunk blockage data to evaluate a BOC's interconnection performance. Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality.

[120] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218; *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65.

[121] 47 C.F.R. § 51.305(a)(5).

[122] Our rules require an incumbent LEC to provide two-way trunking upon request, wherever two-way trunking arrangements are technically feasible. 47 C.F.R. § 51.305(f); *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978-79, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65; *Local Competition First Report and Order*, 11 FCC Rcd 15612-13, paras. 219-220.

interconnection service under "terms and conditions that are no less favorable than the terms and conditions" the BOC provides to its own retail operations.[123]

64. Competing carriers may choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network.[124] Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements.[125] The provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist.[126] In the *Advanced Services First Report and Order*, the Commission revised its collocation rules to require incumbent LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings.[127] To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our implementing rules.[128] Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, helps the Commission evaluate a BOC's compliance with its collocation obligations.[129]

b. Discussion

65. We conclude, as described below, that SWBT demonstrates it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in section 271. We further find that SWBT meets its burden of proof that it designs its interconnection facilities to

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[123] 47 C.F.R. § 51.305(a)(5).

[124] *Local Competition First Report and Order*, 11 FCC Rcd at 15779, paras. 549-50; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 61.

[125] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-82, paras. 549-50; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 62.

[126] 47 U.S.C. § 251(c)(6) (requiring incumbent LECs to provide physical collocation); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

[127] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) *vacated in part, GTE Services Corp. V. FCC*, Nos. 99-1176 *et al.* (D.C. Cir. Mar. 17, 2000) (*Advanced Services First Report and Order or Advanced Services First Report and Order and FNPRM*).

[128] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 183-84 ; *BellSouth Carolina Order*, 13 FCC Rcd at 649-51, para. 62.

[129] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *see Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

meet "the same technical criteria and service standards" that are used for the interoffice trunks within its own network. We also find that SWBT makes interconnection available at any technically feasible point, and that it is providing collocation in Texas in accordance with the Commission's rules. We note that the Texas Commission finds that SWBT has satisfied all aspects of this checklist item.[130]

(i) Interconnection Trunking

66. Based on our review of the record, we are persuaded that SWBT provides competing carriers with interconnection trunking that is equal-in-quality to the interconnection SWBT provides to its own retail operations, and on terms and conditions that are just, reasonable, and nondiscriminatory.[131] SWBT makes interconnection available in Texas through interconnection agreements, including its state-approved T2A agreement.[132] SWBT receives orders for interconnection trunks through the Access Service Request (ASR) process, and accepts ASRs through an electronic application-to-application interface, through a proprietary OSS system, and through manual orders.[133] SWBT provides performance data to measure the quality of interconnection service provided to competing carriers.[134]

67. *Trunk Blockage.* In prior section 271 applications, we relied on trunk blockage data to evaluate a BOC's interconnection quality.[135] SWBT's performance data demonstrates that in the months leading up to its Texas II application, SWBT provided interconnection that is

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[130] Texas Commission Texas I Comments at 10-22.

[131] For certain interconnection performance metrics, the Texas Commission established a benchmark standard for evaluating SWBT's performance (*e.g.*, percent of trunk blockage and average interconnection trunk installation intervals). For other interconnection measurements, such as percent missed due dates for installation, a parity standard is applied.

[132] SWBT Texas I Application App. B (providing interconnection agreements between SWBT and competing carriers); SWBT Texas I Application at 74, 77, 80; Texas Commission Texas I Comments at 10. Several competitive LECs raised complaints regarding receipt from SWBT of notices of termination of the T2A. *See* ALTS and CLEC Coalition Texas II Comments at 14-16; Allegiance Texas II Comments at 3; Z-Tel Texas II Comments at 5-6; Allegiance Texas II Reply Comments at 2. SWBT states that by the terms of the T2A it was required to send such notices six months prior to expiration of the T2A (which would expire after one year if SWBT's application for section 271 authority were not granted). Because SWBT's application is herein granted, the T2A will remain in effect for an additional three years. *See* SWBT Texas II Reply at 47-48.

[133] Texas Commission Texas I Comments at 10.

[134] SWBT Dysart Texas I Aff. at para. 548 and Attach. A, Measurements 70-78, (Performance Measurement Business Rules) (Version 1.6). SWBT has implemented nine Texas Commission-approved performance measures relating to this checklist item, including measures that compare trunk blockage between SWBT and competitive LECs (PM 70), measures that capture missed due dates for trunk installations (PM 73), and measures that provide data on average installation intervals (PM 78). *Id.*; *see also* SWBT Aggregated Performance Measurement Data No. 70-78 at 271-No. 70-71-78 (showing performance measurement data for January 2000 through March 2000).

[135] *Bell Atlantic New York Order*, 15 FCC Rcd at 3981-83, paras. 69-72; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20649-50, para. 76; *Ameritech Michigan Order*, 12 FCC Rcd at 20669-74, paras. 236-245.

equal-in-quality to the interconnection it provides in its own network. Specifically, SWBT's statewide performance data measuring the percentage of calls blocked on outgoing traffic (trunk blockage from SWBT end office and tandem to competitive LEC end office) demonstrates that in the three months immediately preceding its Texas II section 271 application, SWBT was in compliance with the relevant benchmark established in Texas (*i.e.*, blockage not to exceed one percent on these trunks).[136]

68. We find that allegations of some competitive LECs, that they have been unable to obtain the number of interconnection trunks they requested in a timely manner appear to be the exception rather than the rule. Indeed, as we discuss throughout this section, we find that SWBT's performance data indicate that it is providing nondiscriminatory interconnection trunking. To the extent there may have been some problems with trunk provisioning,[137] we agree with the Department of Justice that such issues have been adequately resolved.[138]

69. Competitive LECs allege that they have encountered problems ordering trunks from SWBT which has resulted in blockage on competitive LEC networks, in some cases leading to customer complaints and lost or forgone sales.[139] TWTC, which provided the most extensive

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[136] For SWBT end office to competitive LEC end office, SWBT's statewide data indicate zero (0.0%) trunk blockage for the months of January through March. For SWBT tandem to competitive LEC end office, SWBT's data indicate blockage well below the benchmark, 0.1 % for January and February, 0.0% blockage for March. *See* SWBT Aggregated Performance Data, No. 70-01, 70-02 at 271-No. 70-71 (showing performance measurement data for January 2000 through March 2000). The Texas Commission applied blockage criteria of one percent as a benchmark to ensure that the competitive LEC's network traffic does not experience the same blockage as SWBT's network (citing the disproportionate impact of blocked trunks on new entrants). Texas Commission Texas I Comments at 14; *see also* SWBT Texas I Dysart Aff. at paras. 543-547.

[137] The Department of Justice initially raised concerns in the Texas I application, which were also raised by the competitive LECs themselves, that some competitive LECs had been unable to obtain the number of interconnection trunks they needed and that these competitive LECs had difficulty ordering trunks. *See* Department of Justice Texas I Evaluation at 44-49; *see also* Department of Justice Texas I March 20, 2000 *ex parte* at 1, n.2.

[138] In its Evaluation of SWBT's Texas II application, the Department of Justice stated that "the efforts of SBC, competitive local exchange carriers and the Texas PUC appear to have led to improvements in SBC's interconnection trunking performance and to a better understanding of trunk provisioning by the various parties to the process." Department of Justice Texas II Evaluation at 5. The Texas Commission reviewed SWBT's trunk utilization, forecasting, ordering and provisioning processes, as well as plans to relieve blockage through proper cooperative planning between SWBT and competitive LECs. As a result of this review, SWBT agreed to implement improvements relating to trunk forecasts, data collection, application of exclusions, and the process for ordering trunks. SWBT was also permitted to apply certain exclusions in calculating the performance measurements (*e.g.*, customer not ready exclusion). Texas Commission Texas I Comments at 14; SWBT Deere Texas I Reply Aff. at para. 11; SWBT Laurie Leathers Texas I Aff. (filed Dec. 14, 1999 in Docket 16251); SWBT Deere Texas I Reply Aff. at para. 19; SWBT Dysart Texas I Aff. at para. 56, Attach. K Dysart Aff. (filed Dec. 14 in Docket 16251), *see also* Texas Commission Dec. 16 Open Meeting Transcript at 26-27; 32.

[139] CLEC Coalition Texas I Comments at 7-12, TWTC Nick Summit Texas I Aff. as Attach. 4 to CLEC Coalition Texas I Comments; TWTC Kelsi Reeves Texas I Aff. as Attach. 5 to CLEC Coalition Texas I Comments; ALTS Texas I Comments at 17-23, e.spire Texas I Comments at 3, George Wong Texas I Aff. at 2-4 as Attach. to e.spire Texas I Comments; CompTel Texas I Comments at 10-12, CapRock Jere Thompson Texas I Aff. as Exhibit B to (continued....)

history of its blockage problems, stated that its most severe blockage occurred in Houston during the conversion of the SWBT and TWTC interconnection facilities from one-way to two-way trunks during the second half of 1999.[140] TWTC acknowledges that the blocking ended in mid-October, 1999.[141] Furthermore, we note that SWBT implemented improvements approved by the Texas Commission during supplemental proceedings in November and December 1999 to respond to competitive LEC concerns. As stated above, SWBT meets the state benchmark for PM 70 for January, February, March and April.[142] We also note that, as of October, over 75% of the trunks provisioned in Texas were two-way trunks.[143] In the future, if competitive LECs allege that blocking is occurring on outgoing calls from the competitive LEC network to the BOC network, and that such blockage is not being captured by the state-approved performance measure, then competitive LECs should provide evidence, such as reliable performance data, along with a showing of why the BOC is responsible for the blockage. Should such evidence develop in the future in Texas, we will consider whether enforcement action pursuant to section

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CompTel Texas I Comments; NTS Mitch Elliott Texas I Aff. as Exhibit C to CompTel Texas I Comments; Sprint Texas I Comments at 62-64.

[140] TWTC Reeves Texas I Aff. at paras. 17-24; TWTC Summit Texas I Aff. at paras. 12-14.

[141] TWTC Summit Texas I Aff. at para. 11. SWBT Texas I Application at 79; SWBT Dysart Texas I Aff. at paras. 549-559. *See also* Texas Commission Texas I Comments at 10-22. SWBT modified its trunk ordering guidelines in December 1999. SWBT agreed to accept orders of 12 DS1s per competitive LEC per day (an increase from eight DS1s per day) in each of the four market areas in Texas. This modification was approved by the Texas Commission at its December 16, 1999 Open Meeting. SWBT Deere Reply Aff. at paras. 7-9. SWBT's Deere Attach. A to Reply Aff. (confidential) reflects all occasions on which SWBT has provisioned eight or more DS1s per day, per competitive LEC, per market area from January 1 to February 11, 2000. It shows SWBT has provided 12 or more DS1s per day on at least 18 different occasions. SWBT has also agreed to accept quarterly forecasts from competitive LECs (instead of only semi-annual forecasts accepted previously). According to the business rule for PM 70 (Version 1.6), if a competitive LEC exceeds 25% of its most recent forecast (which must have been provided within the last six months), an exclusion applies. SWBT has agreed to measure the 25% exclusion against forecasts provided by competitive LECs on a quarterly basis. SWBT Deere Texas I Reply Aff. at para. 12; SWBT Dysart Texas I Reply Aff. at para. 64; Texas Commission Texas I Reply Comments at 15-16. *See also* March 8, 2000 *ex parte* letter from SWBT to Magalie Roman Salas, Secretary, Federal Communications Commission.

[142] SWBT Aggregated Performance Measurement Data No. 70-01, 70-2 at 271-No. 70-71 (showing performance measurement data for January 1999 through December 1999). e.spire makes general allegations concerning blockage caused by SWBT and SWBT's lack of assistance to e.spire. e.spire Wong Texas I Aff. paras. 8-12. e.spire's allegations, however, do not disprove the submitted data showing that SWBT met the benchmark on the trunk blocking performance measure (PM 70), as detailed above.

[143] Texas Commission Texas I Comments at 11. We also note that TWTC acknowledged that the conversion from one-way to two-way trunks in Austin "was a huge success for both companies." TWTC Reeves Texas I Aff. at para. 17. This is significant because where a competitive LEC does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request wherever technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. The provisioning of two-way trunking arrangements is among the obligations that the Commission concluded in the *Local Competition Order* demonstrated an incumbent LEC was providing interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations. *Local Competition First Report and Order*, 11 FCC Rcd at 15612-613, paras. 217-220; *see also* 47 C.F.R. § 51.305(f).

271(d)(6) is warranted.

70. *Missed Due Dates.* We find that other aspects of SWBT's performance data further indicate it is providing nondiscriminatory interconnection trunking in Texas. SWBT's performance data concerning the percentage of missed due dates for provisioning of interconnection trunks show that in the months preceding its Texas II application, SWBT provided parity or better performance to competitors.[144] Recently implemented modifications in reporting give us added assurance that SWBT will continue to provide timely installation of interconnection trunks. In response to competitive LEC concerns that the performance measurement does not capture "held orders,"[145] the Texas Commission implemented a new measure, PM 73.1, to capture the percentage of held interconnection trunk orders greater than 90 calendar days.[146] SWBT asserts that there were no held orders greater than 90 days between January and March.[147] We find that SWBT has satisfied the benchmark. Further, commenters

[144] SWBT's percentage of missed due dates:

PM 73: Missed Due Dates			
	Jan	**Feb**	**Mar**
CLEC	10.4%	4.4%	4.1%
SWBT	60.3%	27.6%	22.5%

See SWBT Aggregated Performance Measurement Data PM 73 at 271-No.73-76 (showing performance measurement data for January 2000 through March 2000). SWBT continues to meet the benchmark in April.

[145] "Held orders" are orders that SWBT does not process due to lack of interconnection facilities. A lack of interconnection facilities, in turn, could mean that SWBT could not satisfy its interconnection obligation.

[146] Texas Commission Texas I Comments at 15. The interim measure will be finalized as part of the Texas Commission's six-month review of performance measurements which began in April 2000. *See* Texas Commission Dec. 16, 1999 Open Meeting Transcript at 29-31. CapRock and NTS alleged that the pre-planning process that occurs before SWBT officially counts a competitive LEC's request as an order (*e.g.* scheduling of initial planning meeting and preparation by SWBT of a Service Planning Document summarizing the requirements specified by a competitive LEC), further delays their ability to obtain interconnection trunks (and is not tracked by performance measurements). CompTel Texas I Comments at 10-11, Exhibit C, NTS Mitch Elliot Aff., Exhibit B, Caprock Jere Thompson Aff. SWBT responds that this supposed delay is no more than timely contract preparation. SWBT Texas I Reply Comments at 49. The Texas Commission stated that NTS and Caprock had never brought their complaints to the attention of the Texas Commission, and it did not believe that based on the evidence developed in the Section 271 proceeding that the complaints of NTS and CapRock indicate systemic problems. Inasmuch as the Texas Commission had little opportunity to investigate those complaints and develop a factual record, we accord them little weight. Texas Commission Texas I Reply Comments at 13-14.

[147] *See* SWBT Texas I March 17 *ex parte* Attach. 3; SWBT Texas I February 18 *ex parte* at 5-6; SWBT Dysart Texas I Aff. Attach. K at 11. NTS' allegation that the orders it submitted in December in Amarillo were held for lack of facilities does not constitute evidence demonstrating that SWBT fails to meet the checklist item. Specifically, NTS alleged that when it submitted properly forecasted orders on December 23, 1999, SWBT claimed it did not have enough multiplexing equipment available to fulfill NTS's order and that as of its Texas I filing, the trunks were still not installed. SWBT responded that on December 23, 1999, NTS ordered a single DS-3 facility to support its interconnection trunks in Amarillo. SWBT stated that it responded to NTS the same day explaining that SWBT lacked facilities to provision the DS-3, but offered to fill the order using DS-1s to provide the same capacity. SWBT Texas I *ex parte* letter of March 22, 2000. SWBT stated that NTS ordered the DS-1s on January 4, 2000, but twice delayed provisioning of these trunks on the basis that NTS was not ready to receive them. SWBT stated that (continued....)

have not raised any new allegations of inadequate or overlong trunk provisioning. We note that the Department of Justice agrees that SWBT's performance is satisfactory with respect to this measurement.[148]

71. *Average Installation Intervals.* SWBT's performance data that measure the average time for installation of interconnection trunks demonstrate that SWBT meets the state benchmark in February, March and April.[149] We have considered the concerns of the Telecommunications Resellers Association and others in addition to the Department of Justice, and find that the extensive review by the Texas Commission of SWBT's operational processes and empirical performance data satisfactorily addresses their concerns.[150] We therefore reject the concerns raised in the record regarding SWBT's average installation interval performance as those concerns relate largely to last year's performance. The data submitted as part of the instant application indicate SWBT meets the state benchmark.

72. In conclusion, our decision that SWBT satisfies the requirements of this checklist item is based on the following: its trunk group blockage rates for competitors pass the state benchmark, its rate of missed due dates for trunk installations is lower for service to competitors than for service to itself, and its average time to install interconnection trunks passes the state benchmark.

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most recently, the trunks were scheduled for delivery between March 14 and March 16, but that NTS indicated on each of these dates that it was not ready to accept the trunks. SWBT Texas I *ex parte* letter of March 22,2000. The Texas Commission noted on Reply that it will work with SWBT, NTS [and CapRock] in Docket 20400 to ascertain if there are problems. However, based on the evidence developed in the section 271 proceeding, the Texas Commission did not believe that the complaints of NTS [and CapRock] indicate systemic problems." Texas Commission Texas I Reply. We agree.

[148] Department of Justice Texas II Evaluation at 5, stating that PM 73.1 reports very few orders held for lack of facilities for March 2000.

[149] In February, March, and April, SWBT met the 20 business day benchmark with an average installation interval of 16.5, 17.4, and 17.3 business days respectively for competitive LECs. The Texas Commission established a benchmark instead of a parity measure because SWBT installs more trunks for competitive LECs than for its retail side. Texas Commission Texas I Comments at 16.

[150] Department of Justice Texas I Evaluation at 47; Telecommunications Resellers Association Texas I at 9-10, 13; Sprint Texas I at 62-64; Sprint Texas II Comments at 46; CompTel Texas II Comments at 2. We also note that the performance measures will be reviewed by SWBT, competitive LECs and the Texas Commission every six months, beginning in April 2000, "to determine whether they are properly reflecting the behaviors and results needed for a sustainable competitive market." Texas Commission Texas I Comments at 4. We disagree with the allegation of Pontio that its interconnection dispute with SWBT disqualifies SWBT from receiving section 271 authority. Specifically, Pontio alleges that SWBT will not provide requested interconnection trunks unless Pontio agrees to an amended interconnection agreement that would impose per minute local switching charges. *See* Texas II Comments of @Link, BlueStar, DSLnet et. al. at 23. SWBT states that the trunks at issue were provisioned on May 11, 2000 and the terms to recover the appropriate costs for the use of those facilities are subject to ongoing negotiations with Pontio. *See* SWBT Texas II Reply at 50. We believe Pontio's alleged difficulties are best resolved through the section 252 negotiation and arbitration process.

(ii) Collocation

73. SWBT has demonstrated that its collocation offering in Texas satisfies the requirements of sections 271 and 251 of the Act. SWBT provides physical and virtual collocation through a state-approved tariff.[151] In its application, SWBT indicates that shared, cageless, and adjacent collocation options are available in Texas, and that it has taken other steps to implement the collocation requirements contained in the *Advanced Services First Report and Order*.[152] SWBT provides terms for physical collocation in its physical collocation tariff, as well as in a physical collocation handbook that it incorporates into the tariff by reference.[153] SWBT's collocation performance data indicate that SWBT processed requests for collocation within time frames established by the Texas Commission. SWBT stated that it has provided 655 physical collocation arrangements in 166 different SWBT central offices in Texas. Except where a competitive LEC places a large number of collocation orders in the same 5-business day period, SWBT responds to each request within 10 days.[154] SWBT provides three measurements (disaggregated into various submeasures) for collocation: Percentage of Missed Collocation Due Dates (PM 107), Average Delay Days for SWBT Missed Due Dates (PM 108), and Percent of Requests Processed within the Tariffed Timelines (PM 109). Where data points are available, SWBT's data indicates it meets the measures for the months of January, February, and March.[155]

74. SWBT makes virtual collocation available through its virtual collocation tariff, with notification and installation intervals for all tariffed equipment established in SWBT's Interconnector's Collocation Services Handbook for Virtual Collocation.[156] In addition, SWBT states that competitive LECs may negotiate custom-tailored interconnection arrangements on

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[151] SWBT's physical and virtual collocation tariffs were revised in connection with the Texas Commission's collaborative process and workshops designed to address competitive LEC concerns. The revised physical and virtual collocation tariffs became effective upon state approval October 29, 1999. *See* Texas Commission Texas I Comments at 16. SWBT's physical collocation tariff contained a 50 square foot minimum space requirement for shared cage collocation. However, our rules provide that an ILEC must make shared collocation space available in single-bay increments or their equivalent, *i.e.*, a competing carrier can purchase space in increments small enough to collocate a single rack, or bay, of equipment. 47 CFR § 51.323 (k)(1). We note that SWBT eliminated the minimum space requirement and notified competitive LECs through an Accessible Letter of February 29, 2000 that it had removed the minimum space requirement. *See* SWBT Accessible Letter of February 29, 2000 "Clarification of minimum cage size for Caged and Shared Cage collocation Kansas, Missouri, Oklahoma, Texas ," No. CLEC00-050.

[152] SWBT Texas I Application at 73-78; *see also* Texas Commission Texas I Comments at 16-22.

[153] SWBT Texas I Application at 74.

[154] SWBT Texas I Application at 75, SWBT Dysart Texas I Aff. at para. 629, SWBT Auinbauh Texas I Aff. at paras. 44-45.

[155] *See* SWBT Aggregated Performance Measurement Data PMs 107-109 at 271-No. 107a –109b (showing performance measurement data for January 2000 through March 2000).

[156] SWBT Texas I Application at 77. SWBT states that it has completed 40 virtual collocation arrangements in Texas.

request.[157] The Texas Commission agrees that SWBT's revised physical collocation offerings comply with the *Advanced Services Order*.[158] Further, SWBT's collocation offering underwent an active and thorough review at the state level. The Texas Commission addressed the provisioning of collocation space and established standard provisioning intervals for caged, cageless, and virtual collocation.[159]

75. We disagree with ALTS and the CLEC Coalition that SWBT's practice of walling in its own equipment as a "reasonable security measure" violates our collocation rules.[160] Our rules as they existed at the time of filing did not explicitly prohibit this practice.[161] Therefore, we find that these allegations do not rise to the level of non-compliance for this checklist item.[162] In addition, we believe that Metromedia Fiber Network Services' (MFNS) alleged difficulties negotiating collocation arrangements with SWBT are best resolved through the section 252 negotiation and arbitration process or through the section 208 complaint process.[163]

(iii) Technically Feasible Points of Interconnection

76. We conclude that SWBT provides interconnection at all technically feasible points, and therefore demonstrates compliance with the checklist item. SWBT asserts that it makes each of its standard methods of interconnection available at the line side or trunk side of

[157] SWBT Texas I Application at 78.

[158] "SWBT's physical and virtual collocation tariffs have been revised in conformance with the Texas Commission recommendations, and address the myriad competitive LEC concerns discussed at length in the Texas Commission's collaborative process and workshops." Texas Commission Texas I Comments at 16.

[159] Texas Commission Texas I Comments at 17-18.

[160] ALTS and the CLEC Coalition objected to SWBT's practice of walling in its own equipment as a "reasonable security measure" associated with cageless collocation and then charging competitive LECs for the construction. The competitive LECs contended this practice is not contemplated by the Commission's *Advanced Services First Report and Order*. ALTS Texas I Comments at 24; CLEC Coalition Texas I Comments at 12; *see also* AT&T's DeYoung Texas I Aff. at para. 327 n.240. Pending completion of the Texas Commission's rate proceedings, the interim rate for security for cageless collocation is zero, subject to true-up. SWBT argues therefore that as a practical matter there is no genuine issue. *See* pricing discussion *infra* at section V.A.2; SWBT's Auinbauh Texas I Reply Aff. at para. 32; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3987-88, para. 79.

[161] *See* Petition for Partial Reconsideration or Clarification filed June 1, 1999, Sprint Corporation requests that we clarify and further strengthen the collocation rules adopted in the *Advanced Services First Report and Order*.

[162] On March 17, 1999, the D.C. Circuit vacated and remanded certain aspects of the *Advanced Services First Report and Order*, including the relevant sections at issue here. *See GTE Service Corp. v. FCC*, Nos. 99-1176 *et al.* (D.C. Cir. Mar. 17, 2000).

[163] *See* MFNS Texas I Comments and Reply Comments. *See also* Auinbauh Texas I Reply Aff. at paras. 25-26. MFNS filed a section 208 complaint with the Commission's Enforcement Bureau on February 15, 2000 requesting that SWBT be directed to provide its Competitive Alternate Transport Terminal "CATT" interconnection. That complaint was dismissed without prejudice for failure to comply with the Commission's complaint requirements. *See* February 28, 2000 Letter from Radhika V. Karmarkar, Enforcement Bureau, to Karen Nations (MFNS), Jonathan E. Canis and David A. Konuch (Kelley Drye & Warren) and Christine Jines (SBC).

the local switch, the trunk connection points of a tandem switch, central office cross-connect points, out-of-band signaling transfer points, and points of access to UNEs.[164] SWBT demonstrates that it has an approved state interconnection agreement that spells out readily available points of interconnection, and provides a process for requesting interconnection at additional, technically feasible points.[165]

77. We disagree with AT&T that SWBT has violated its obligation to permit competing carriers to select interconnection points.[166] The existing language in the interconnection agreement between SWBT and AT&T states that "in each SWBT exchange area in which AT&T offers local exchange services, the parties will interconnect their network facilities at a minimum of one mutually agreeable point of interconnection."[167] This portion of the interconnection agreement between SWBT and AT&T, however, was negotiated and, therefore, does not have to comply with section 251.[168] Consequently, AT&T's experience does not constitute evidence of a failure by SWBT to provide interconnection at all technically feasible points for purposes of section 271 review.[169]

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[164] SWBT Deere Texas I Aff. at paras. 14; 20-21. SWBT will provide other technically feasible alternatives using the Special Request Procedure set forth in the T2A. *Id.* at 14.

[165] SWBT Texas I Application at 73-78. SWBT's state approved T2A requires SWBT to provide other collocation arrangements that have been demonstrated to be technically feasible and in compliance with the *Advanced Services Order*. The T2A provides a rebuttable presumption of technical feasibility when a collocation arrangement has been deployed by any incumbent LEC. *Id.* at 17.

[166] Specifically, AT&T objects to SWBT's requirement that AT&T establish direct trunks to each central office in the Dallas exchange area, which is not served by a local tandem, instead of allowing AT&T to interconnect at the access tandem serving the central offices in the Dallas exchange area. AT&T alleged that SWBT's requirement led to a three-month delay in AT&T's final testing of its telephony-over-cable service in the Dallas area. *See* AT&T Texas I Comments at 59-60; AT&T Texas I DeYoung Aff. at paras. 20-26; AT&T *ex parte* of March 8, 2000; AT&T Texas II Reply Comments at 49; *but see* SWBT Deere Texas I Reply Aff. at 24-25; SWBT Texas II *ex parte* of April 26; SWBT Texas II Reply Comments at 50-54. *See also* AT&T Texas II *ex parte* letter of June 13, 2000.

[167] *See* SWBT Deere Texas II Reply Aff., App. A-4 at 5-7; AT&T Texas II Reply Comments, DeYoung/Fettig Decl., at 5 n.7.

[168] SWBT Texas II Reply Comments at 53. SWBT notes that the issues raised by AT&T will be debated before the Texas Commission in a pending arbitration between SWBT and AT&T. SWBT Deere Texas II Reply Aff. App. A-4 at 7. We believe that AT&T's issue is appropriately resolved through the Texas Commission's arbitration process. *See AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications, Inc's Response to Southwestern Bell Telephone Company's Petition for Arbitration*, Tex. PUC Docket 22315 at 13-17 (filed April 17, 2000).

[169] In addition, we find that SWBT satisfactorily addresses AT&T's concern that SWBT does not allow virtual collocation if space for physical collocation is available. AT&T's DeYoung Texas I Aff. at para. 332; *see also* AT&T's March 8, 2000 *ex parte* at 2-3. SWBT confirms that sections 25 and 26 of SWBT's Virtual Collocation Tariff make virtual collocation available to competitive LECs regardless of the availability of physical collocation; the restriction to which AT&T refers involves a maintenance and repair option for virtually collocated equipment, and such language does not deny virtual collocation as alleged by AT&T. SWBT Texas I Reply Comments at 51; Auinbauh Texas I Reply Aff. at paras. 34-35.

78. Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.[170] The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible.[171] Thus, new entrants may select the "most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination."[172] Indeed, "section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points."[173] We note that in SWBT's interconnection agreement with MCI (WorldCom), WorldCom may designate "a single interconnection point within a LATA."[174] Thus, SWBT provides WorldCom interconnection at any technically feasible point, and section 252(i) entitles AT&T, or any requesting carrier, to seek the same terms and conditions as those contained in WorldCom's agreement, a matter any carrier is free to take up with the Texas Commission.[175]

2. Pricing of Interconnection

a. Background

79. As discussed above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[176] Section 251(c)(2)

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[170] *See* 47 U.S.C § 251(c)(2),(3); *see also* 47 C.F.R. §51.305(a)(2); *see, e.g., Memorandum of the Federal Communications Commission as Amicus Curiae, US West Communications, Inc., vs. AT&T Communications of the Pacific Northwest, Inc. et. al*, No. CV 97-1575 JE.

[171] 47 C.F.R Section 51.305(e); *see also Local Competition First Report and Order*, 11 FCC Rcd at 15602, 15605-06, paras. 198, 203, 205.

[172] *See Local Competition First Report and Order*, 11 FCC Rcd at 15588, para. 172.

[173] *Local Competition First Report and Order*, 11 FCC Rcd at 15608, para. 209.

[174] *See* SWBT Texas II Application , App. 5, Tab 45, MCI(WorldCom) Agreement Attach. 4, § 1.2.2. Section 1.2.2 of the WorldCom Agreement states: "MCI(WorldCom) and SWBT agree that MCI(WorldCom) may designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities." SWBT Texas II Application , App. 5, Tab 45, WorldCom Agreement Attach. 4, § 1.2.2

[175] *See* 47 U.S.C. § 252(i). Section 252(i) makes these terms and conditions available to all requesting carriers despite SWBT's statement that it requires competitive LECs to interconnect in every local exchange area. *See* SWBT Texas II Reply at 50.

[176] 47 U.S.C. § 271(c)(2)(B)(i).

requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network ... on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[177] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[178]

80. Interconnection trunking, physical and virtual collocation, and meet-point arrangements are among the technically feasible methods of interconnection.[179] Shared cage and cageless collocation arrangements must be part of an incumbent LEC's physical collocation offerings.[180] To comply with its collocation obligations, an incumbent LEC must make collocation arrangements available on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[181] The Commission's pricing rules require, among other things, that incumbent LECs provide collocation based on the total element, long-run, incremental cost (TELRIC).[182]

81. Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[183] the Supreme Court restored the Commission's pricing authority on January 25, 1999.[184] In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[185] Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section."[186] The Court

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[177] 47 U.S.C. § 251(c)(2).

[178] 47 U.S.C. § 252(d)(1).

[179] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-81, paras. 549-53. In a physical collocation arrangement, an interconnecting carrier has physical access to space in the LEC central office to connect to the incumbent LEC network. *Id.* at 15784, para. 559, and n.1361. In a virtual collocation arrangement, interconnectors designate central office transmission equipment dedicated to their use, but have no right to enter the central office and do not pay for incumbent LEC floor space. *Id.* In a meet-point arrangement, the parties negotiate a point at which one carrier's responsibility for service ends and the other carrier's begins. *See id.* at 15778, n.1332.

[180] *Advanced Services First Report and Order*, 14 FCC Rcd at 4783-85, paras. 40-42.

[181] *See* 47 U.S.C. § 251(c)(6); 47 C.F.R. §§ 51.305(a)(5), 51.321(a)-(b); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para 66.

[182] *See* 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

[183] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (1997).

[184] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[185] *Id.* at 380.

[186] *Id.* at 382.

also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states.[187] The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result."[188]

b. Discussion

82. Based on the evidence in the record, we find that SWBT offers interconnection in Texas to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1.[189] SWBT states that it provides interconnection at TELRIC-based rates that are just, reasonable, and nondiscriminatory.[190] SWBT provides terms for physical collocation in its physical collocation tariff, as well as in a physical collocation handbook that it incorporates into the tariff by reference.[191] SWBT makes virtual collocation available through its virtual collocation tariff.[192] SWBT says it will also negotiate custom-tailored interconnection arrangements on request.[193] According to SWBT, TELRIC-based charges apply to custom work even if no rate has been established previously.[194] SWBT states that it pro-rates its site preparation charges and allocates them based on the percentage of the total space each competitive LEC uses.[195] SWBT also says that it pro-rates its collocation charges so that the first competitive LEC to enter the premises is not responsible for all the site preparation costs.[196]

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[187] *Id.* at 384.

[188] *Id.*

[189] We note that other unbundled network elements are required pursuant to the checklist, but we discuss them in the context of other checklist items. Additionally, we discuss UNE pricing, including both recurring and non-recurring charges, in checklist item 2; rates for access to poles, ducts, and conduits in checklist item 3; the pricing of directory assistance and operator services in checklist item 7; reciprocal compensation rates in checklist item 13; and resale rates in checklist item 14.

[190] SWBT Texas I Application at 72, 80; SWBT Texas I Auinbauh Aff at para. 148.

[191] *See* SWBT Texas I Application at 74, 80.

[192] *Id.* at 77.

[193] *Id.* at 78.

[194] *Id.* at 80; SWBT Texas I Auinbauh Aff. at para. 149.

[195] SWBT Texas I Application at 80; SWBT Texas I Auinbauh Aff. at paras. 59-60, 63.

[196] SWBT Texas I Application at 80; SWBT Texas I Auinbauh Aff. at para. 59-60, 63.

83. The Texas Commission states in its evaluation that SWBT has satisfied the requirements of checklist item 1.[197] According to the Texas Commission, SWBT provides interconnection trunking at just, reasonable, and nondiscriminatory terms and conditions.[198] The state commission says that SWBT makes interconnection available through the Texas Commission-approved 271 agreement, and that the Texas-approved physical and virtual collocation tariffs comply with sections 251 and 271 of the Act.[199]

84. We stress that we place great weight on the Texas Commission's active review of SWBT's pricing elements in its 271 application. The Texas Commission has encouraged active and open participation by all carriers in setting rates through numerous proceedings, reviewed costs studies and conflicting testimonies, arbitrated pricing issues and incorporated its findings into interconnection agreements, and has demonstrated its commitment to applying the pricing standards of sections 251 and 252 of the Act as implemented by our rules.[200]

85. As the Texas Commission explains, "[t]he collocation tariffs contain interim rates, subject to true-up, for all aspects and methods of available collocation."[201] AT&T argues that the interim nature of these rates proves fatal to SWBT's application in light of our discussion of interim rates in the *Bell Atlantic New York Order*.[202] We disagree. In that order, we stated that:

> a BOC's application for in-region interLATA authority should not be rejected solely because permanent rates may not yet have been established for each and every element or nonrecurring cost of provisioning an element. We believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff.[203]

86. We concluded that the interim nature of Bell Atlantic's xDSL rates posed no obstacle to the approval of its application. We reasoned that the xDSL rate dispute was relatively new, that the New York Commission has a track record of setting other prices at TELRIC rates,

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[197] Texas I Commission Comments at 10.

[198] *Id.*

[199] *Id.* at 10, 16, 21.

[200] *See* Texas I Commission Comments at 80; Texas II Commission Comments at 55-58; Letter from Donna Nelson, Director-Telecommunications, Legal Division, Texas Public Utility Commission to Magalie Roman Salas, CC Docket No. 00-65, Attach. 5, Interim Award at 17 (filed June 19, 2000) (Texas Commission June 19 *Ex Parte*).

[201] Texas I Commission Comments at 21.

[202] AT&T Texas I Comments at 41; AT&T Texas I DeYoung Aff. at paras. 317-18, 328.

[203] *Bell Atlantic New York Order*, 15 FCC Rcd at 4090, para. 258.